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ASSESSING THE ROLE OF HISTORY IN THE FEDERAL COURTS CANON: A WORD OF CAUTION

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INTRODUCTION

One of the most pervasive and important debates in federal courts jurisprudence is over the role that history should play in interpreting Article III of the United States Constitution. To that end, federal courts jurisprudence is not altogether different from constitutional law jurisprudence more generally. But in the federal courts arena—more so than in the broader domain of constitutional law—originalism has always wielded tremendous influence over much of the judicial and scholarly thinking.¹ It is for this reason that a distinct conversation about its role in the federal courts canon is appropriate.

The panel giving rise to the following papers tackled this topic from different angles, and enriched the larger debate. First, on the panel (and elsewhere in their writing), Professors Bellia and Clark made the case for the importance of unearthing the historical backdrop against which the Constitution and early statutes were written as necessary to place the Founding

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* Professor of Law, University of California, Berkeley School of Law. This Essay arises out of the 2015 panel of the Federal Courts Section at the American Association of Law Schools Annual Conference, where the participants were joined by Justice Scalia for a lively debate of these issues. In appreciation for their helpful discussions and comments, I thank A.J. Bellia, Bradford Clark, Richard Fallon, Tara Grove, Gerard Magliocca, and David Shapiro. Neda Khoshkhoo and James Matthew Rice provided superb research assistance.

1 For example, as Professor Fallon has written, “the originalist and textualist style of reasoning . . . has characterized nearly all leading academic writings on congressional control of jurisdiction.” Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1047 (2010).

period in its proper legal context.² Second, on the panel and in his paper here, Professor Fallon calls attention to the fact that the historical record that nearly everyone implicitly recognizes as pertinent (when not in the throes of a methodological debate) is exceptionally complex and multifaceted.³ Professor Fallon's paper further proposes an interpretive framework for thinking about these issues that takes us beyond simply fixating on questions of original public meaning—which, he contends, is often indeterminate—and invites attention to a wealth of other historical and functional considerations.⁴ Finally, Professor Grove's presentation and paper that follows highlight that many of the hardest questions of federal courts jurisprudence have been debated repeatedly in the legislative branch, and she poses important questions about what to do, if anything, with this political history of the federal courts.⁵

There is little question that in the field of federal courts, historical study has a great deal to contribute to modern debates. Indeed, historical study holds enormous potential to illuminate the founding purpose behind constitutional provisions, to unearth contemporary meanings associated with terms of art that were included in the document, and to uncover important evidence relating to historical practices and context, which in turn can shed light on the background understandings and assumptions that underlie constitutional text. Indeed, much of my own scholarship has been work of this kind, aimed at uncovering the purpose, context, and background understandings that informed the adoption of the Suspension Clause.⁶

2 Professors Bellia and Clark make a compelling case that such analysis is necessary to tell a comprehensive story of the Alien Tort Statute. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609 (2015); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011). They have also argued that such analysis is necessary to a full understanding of those provisions in the Constitution that relate to war and foreign relations. See ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS IN UNITED STATES COURTS* (forthcoming 2016); Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729 (2012).

3 Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015).

4 *Id.* at 1755.

5 Tara Leigh Grove, *Article III in the Political Branches*, 90 NOTRE DAME L. REV. 1835 (2015). For additional work by Professor Grove highlighting many of these debates, see Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 933–38 (2013) (discussing “prior scholarship on Congress’s power over the Supreme Court’s appellate jurisdiction”).

6 See, e.g., AMANDA L. TYLER, *HABEAS CORPUS GOES TO WAR: TRACING THE STORY OF THE UNITED STATES CONSTITUTION’S HABEAS PRIVILEGE FROM THE TOWER OF LONDON TO GUANTÁNAMO BAY* 635 (2016); Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CALIF. L. REV. (forthcoming 2015) [hereinafter Tyler, *Habeas Corpus*]; Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 604–05 (2009) (detailing the “historical understanding of suspension” that controlled in seventeenth and eighteenth century England as well as during key American episodes); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 906 (2012) (exploring the “histori-

But sometimes—if not often—the historical record on important questions of federal courts jurisprudence is absent, incomplete, or more complex than jurists and scholars tend to acknowledge. In keeping with this idea, one should never forget that certain aspects of the Constitution—including Article III and the structural framework within which it is situated—represented major innovations in their time. At the Founding, the concept of federalism—and with it the idea of two sets of courts, state and federal—was entirely new. Further, the separation of powers framework was, at the least, a transformation of the British model, if not a dramatic departure from it.⁷ Against this backdrop, it would be curious indeed if the details of the Article III power were fully settled from the outset. More likely, as Madison recognized early on, there would need to be a “liquidat[ion]” of meaning over time,⁸ or, as he phrased the matter some forty years after ratification: “That in a Constitution, so new, and so complicated, there should be occasional difficulties & differences in the practical expositions of it, can surprize no one.”⁹

Accordingly, I wish to offer a word of caution about making historical arguments in federal courts jurisprudence. Specifically, in undertaking historical inquiry in the field of federal courts, one must be careful about assigning certain data points from the Founding period determinative weight, rather than treating them as part of a larger conversation about the role of the judicial power in our constitutional framework. This is because in studying the early years following ratification of the Constitution, one tends to find both examples of major principles that remained the subject of disagreement as well as examples of early legislation and practices that today we

cal evidence that informed the adoption of the Suspension Clause” and inquiring “whether the Founding generation’s understanding of that clause permitted the government to detain without formal charges persons enjoying the full protection of domestic law for criminal or national security purposes in the absence of a valid suspension” (footnotes omitted)).

7 See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (referring to separation of powers as “a distinctively American political doctrine”); see also John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 27–29, 36–56 (2001) (noting many structural differences between English and American legal traditions). Of course, Montesquieu’s *The Spirit of the Laws*, first published in 1748 and which promoted the idea of separating power to protect individual liberty, heavily influenced the Founding generation.

8 THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) (“All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

9 Letter from James Madison to M.L. Hurlbert (May 1830), in 9 THE WRITINGS OF JAMES MADISON 372 (Gaillard Hunt ed., 1910); see also Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 450 (Gaillard Hunt ed., 1908) (“It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter; more especially those which divide legislation between the General & local Governments; and that it might require a regular course of practice to liquidate & settle the meaning of some of them.”).

would reject as plainly inconsistent with the constitutional separation of powers. In support of this point, below I offer a few examples that together call into doubt the notion that the early Congresses had fully worked through—and correctly resolved—the many complicated issues affecting the scope of the federal judicial power. Although scholars have long recognized the limitations of reliance on history generally in constitutional interpretation, these examples are offered as a contribution to a key debate in the federal courts arena. In particular, by focusing on these contested and, in some cases, questionable actions of all three branches in the early years of the Republic, I hope to highlight some of the inherent problems with tackling questions regarding the delineations of the Article III power through an exclusively originalist approach.

I. THE INFLUENCE OF THE FOUNDING PERIOD ON FEDERAL COURTS JURISPRUDENCE

It has long been a principle of constitutional law that special significance is assigned to the practices of and statutes enacted by the first Congress, legislating as it was in the shadow of the Constitutional Convention. As the Supreme Court posited in 1888, an act “passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.”¹⁰ The Court has repeated this refrain on many occasions.¹¹ As some scholars have argued, moreover, early congressional debates provide “important evidence of what thoughtful and responsible public servants close to the adoption of the Constitution thought it meant.”¹²

This principle has taken on special meaning in the field of federal courts. Take Justice Story’s opinion in *Martin v. Hunter’s Lessee*,¹³ defending the constitutionality of Supreme Court review of state court decisions. For Justice Story, it was significant that § 25 of the Act expressly contemplated such review (albeit only in cases in which asserted federal rights had been denied by the state courts) and that “the judiciary act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution.”¹⁴

Drawing on this idea, a good deal of federal courts scholarship and jurisprudence focuses on the Founding period, and on the first Judiciary Act of 1789 in particular, as enormously important, if not determinative of many questions at the heart of the federal courts canon. To take but one example

10 *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

11 *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004) (“The First Congress . . . reflected the understanding of the framing generation and included some of the Framers . . .”); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (same).

12 David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 865 (1994).

13 14 U.S. (1 Wheat.) 304 (1816).

14 *Id.* at 351.

in the field, many scholars have pointed to the terms of the 1789 Act as standing for the proposition that the Constitution does not mandate that a federal court (whether supreme or inferior) always be available to hear federal questions, or even constitutional ones.¹⁵ Instead, for those who subscribe to this view, it is significant that the first Judiciary Act of 1789 both failed to vest general federal question jurisdiction in the inferior federal courts and also declined to vest appellate jurisdiction in the Supreme Court over the full range of federal questions coming out of the state courts.¹⁶

Just how much weight early practices and statutes should be given by jurists and scholars is not entirely clear, however. Based upon a few notable examples, the next Part suggests that some pause might be in order.

II. WHEN THE HISTORICAL RECORD SUGGESTS A WORK IN PROGRESS

There is no question that what the Founding generation thought “is surely of interest . . . to anyone trying two hundred years later to figure out

15 See, e.g., Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990) (relying upon the terms of the first Judiciary Act, and specifically its many gaps, to question mandatory jurisdiction theories of federal jurisdiction); see also John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997) (making similar arguments); cf. Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 763 (1997) (positing that the historical records support the conclusion that “Congress possesses nearly plenary authority to regulate the jurisdiction of federal courts”). Notable examples of different approaches include Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (recounting the argument of one speaker in his famous *Dialogue* that “the exceptions [to the appellate jurisdiction of the Supreme Court] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan”); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 184, 201–02 (1960) (contending that the appellate jurisdiction of the Supreme Court must enable the Court to execute its essential functions of “maintaining the uniformity and supremacy of federal law”); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) (arguing that the history and logic of the Constitution require that some federal courts preside over constitutional claims).

16 Setting aside a short-lived provision in the famous Midnight Judges Act, see Judiciary Act of 1801, ch. 4, 2 Stat. 89, Congress did not provide for general federal question jurisdiction until 1875. See Act of Mar. 3, 1875, § 1, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (2012)). Section 25 of the 1789 Judiciary Act vested appellate jurisdiction in the Supreme Court exclusively over state court decisions that *denied* recognition to asserted federal rights. See Judiciary Act of 1789, ch. 20, 1 Stat. 73. Congress did not grant two-way review to the Supreme Court of federal questions coming out of the state courts until the Judiciary Act of 1914. See Judiciary Act of 1914, Pub. L. No. 63-224, ch. 2, 38 Stat. 790. The Supreme Court also lacked appellate jurisdiction over the full range of criminal matters decided in the lower federal courts until 1891. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 276–78 (6th ed. 2009) [hereinafter HART & WECHSLER].

what the Constitution means.”¹⁷ Accepting this premise, I aim nonetheless to promote a healthy dose of skepticism as to whether the early Congresses had either fully agreed upon or entirely worked out every aspect of the federal judicial power. To advance the argument, I offer some examples below.

A. Hayburn’s Case

Today we teach *Hayburn’s Case*¹⁸ in the federal courts curriculum as a defining moment in the early charting of the contours of the judicial power. The statute at issue in that case, the Invalid Pensions Act of 1792,¹⁹ set up a curious structure—to put it mildly—for injured Revolutionary War veterans to seek listing on the veteran pensioner rolls. As the editors of *Hart & Wechsler’s The Federal Courts and the Federal System* describe it:

The courts were to receive evidence of the petitioners’ military service, their war injuries, their resulting disabilities, and the proportion of their monthly pay corresponding to those disabilities. If the court found that a petitioner qualified for a pension, it was directed to submit the petitioner’s name, as well as a recommended sum, to the Secretary of War. The statute directed the Secretary to place any applicant certified by a circuit court on the pension list, except that, in cases of suspected “imposition or mistake”, the Secretary was to withhold the suspected petitioner’s name and so report to Congress [which in turn reviewed the Secretary’s recommendations].²⁰

Attorney General Edmund Randolph, who had of course been a major player at the Constitutional Convention and the Virginia Ratifying Convention, filed a motion in the Supreme Court for a writ of mandamus to run against the Circuit Court for the District of Pennsylvania that would “command[] the said court to proceed” on the petition of William Hayburn, an applicant for listing on the pension roles.²¹ Before the Supreme Court

17 David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 218 (1995). Indeed, today, “[v]irtually everyone agrees” that text and original meaning matter in constitutional interpretation. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 881 (1996).

18 2 U.S. (2 Dall.) 409 (1792).

19 Invalid Pensions Act of 1792, ch. 11, 1 Stat. 243 (amended 1793).

20 HART & WECHSLER, *supra* note 16, at 80–81.

21 *Hayburn’s Case*, 2 U.S. (2 Dall.) at 409. Notably, Randolph also represented the plaintiff in *Chisholm v. Georgia*, in which he argued successfully that a jurisdictional grant in section 14 of the 1789 Act contemplated suits against unconsenting states over claims brought by out-of-state parties under the diversity jurisdiction. 2 U.S. (2 Dall.) 419 (1793); see John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1923 (1983) (providing details on the context in which *Chisholm* arose). The modern Supreme Court’s reading of *Chisholm*, the subject of tremendous scholarly debate, rejects that decision as at odds with the background presuppositions against which the Constitution was ratified. See, e.g., *Alden v. Maine*, 527 U.S. 706, 727 (1999) (“[T]he views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in his dissenting opinion in *Chisholm*, reflect the original understanding of the Constitution.”).

resolved the matter, Congress amended the legislation, but not before five Justices made their views known while riding circuit that the statutory scheme violated the Constitution's separation of powers.²²

Looking back with the benefit of two hundred-plus years of hindsight, the assertions of Justices Wilson and Blair that the scheme was "radically inconsistent with the independence of th[e] judicial power" and of Justice Iredell that "no decision of any court of the United States can . . . be liable to a reversion, or even suspension, by the Legislature itself" seem to state the obvious.²³ And their reactions to the Invalid Pensions Act scheme make a modern case like *Plaut v. Spendthrift Farm, Inc.*, in which Congress attempted to command the reopening of final judgments, an easy one.²⁴ But the obviousness of the scheme's unconstitutionality was lost on the members of Congress who initially drafted and adopted the pensioner system, a substantial number of whom had also served in the preceding Congress that had recently passed the 1789 Judiciary Act.

B. *The 1792 Calling Forth Act*

The Second Congress passed another statutory scheme that today we would, at the very least, label as curious. In the 1792 Calling Forth Act, Congress set forth detailed standards and procedures governing when and how the President could "call forth" state militias to address invasions and insurrections.²⁵ The first section of the Act gave the President the power to call forth such militia "as he may judge necessary to repel [an] invasion" or "sufficient to suppress [an] insurrection."²⁶ The second section of the Act, however, required the President to seek certification from a judge before calling forth the militia in certain circumstances. Specifically, it provided:

That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed.²⁷

During the Whiskey Rebellion in 1794, President George Washington invoked his authority under the Act to take measures for "calling forth" the militia in order "to suppress" the rebellion and he ordered the insurgents to

22 See HART & WECHSLER, *supra* note 16, at 84.

23 *Hayburn's Case*, 2 U.S. (2 Dall.) at 411–14 (replicating in the Reporter's Note the letters to the President from which these quotes are taken). Note that the Justices were joined by sitting district judges in each letter. See *id.* at 411.

24 514 U.S. 211, 219 (1995) (arguing that the Founding generation rejected the British "system of intermingled legislative and judicial powers").

25 1792 Calling Forth Act, ch. 28, § 3, 1 Stat. 264 (repealed 1795).

26 *Id.* § 1.

27 *Id.* § 2.

disperse at the risk of being arrested.²⁸ He did so, moreover, after following the procedures contemplated in section 2 of the Act and submitting the matter to Associate Justice James Wilson. President Washington reported in his proclamation, in which he invoked his authority to call up the militia, that he had presented the matter to Justice Wilson, who

did, from evidence which had been laid before him, notify to me that in the counties of Washington and Alleghany, in Pennsylvania, laws of the United States are opposed and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshal of that District.²⁹

In other words, President Washington sent troops to put down the Whiskey Rebellion only after receiving certification from a Supreme Court Justice that the situation was dire enough to warrant such a dramatic response.

The contemporary practices of courts leading up to this period may offer some explanation for why the Second Congress adopted, and President Washington worked within, this structure for responding to the violent insurrection at hand.³⁰ But it is fair to say that many modern jurists and commentators would label as odd, if not constitutionally suspect, a scheme that required the President to seek judicial certification before exercising his powers as commander in chief.³¹

C. The Correspondence of the Justices

Around the same time, President George Washington, who had served as President of the Constitutional Convention, also apparently believed that he could send abstract legal questions to the Supreme Court Justices in order to obtain their advice on how to navigate various legal constraints in the face of warring among the European powers. Specifically, in 1793, through his Sec-

²⁸ *Id.* § 1.

²⁹ Proclamation of President George Washington, (Aug. 7, 1794), *published in Dunlap and Claypoole's American Daily Advertiser*, Aug. 11, 1794 (internal quotation marks omitted).

³⁰ See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 *YALE L.J.* 1346 (2015); *id.* at 1425–32 (discussing *Hayburn's Case* and calling into question some modern readings of the case). For more details on the 1792 Calling Forth Act and the Whiskey Rebellion, consult Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 *YALE L.J.* 149, 159–63 (2004).

³¹ On a separate note, the episode has the potential to contribute to debates over the capacity of courts to review questions going to the existence or nonexistence of wartime conditions. On this debate, see JOHN HART ELY, *WAR AND RESPONSIBILITY* 55 (1993) (“[T]he Supreme Court has routinely decided ‘foreign affairs’ and ‘national security’ cases throughout the nation’s history, and more specifically has from the outset decided numerous cases involving the ‘war power,’ [including] the question whether Congress had sufficiently authorized a military action the president was conducting.” (footnotes omitted)); *id.* at 176 n.46 (citing numerous cases); HART & WECHSLER, *supra* note 16, at 244–47 (detailing the reluctance of modern courts to decide cases involving war powers questions); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 *STAN. L. REV.* 333, 360 (2006) (arguing that courts may review a suspension to ensure that the predicate condition of a rebellion or invasion exists).

retary of State, Thomas Jefferson, Washington sought the advice of the Justices with respect to a list of twenty-nine multi-part questions.³² The Justices politely declined to answer the questions on account of their “being judges of a court in the last resort . . . which afford[s] strong arguments against the propriety of our extra-judicially deciding the questions.”³³ Today we teach the episode as settling the canonical rule that the federal judicial power does not permit issuance of advisory opinions. But if Washington and Jefferson sent the questions over with genuine expectation of soliciting advice,³⁴ it would seem hard to make the argument that the principle was universally settled at the Founding.³⁵

As Professor Fallon observes in his paper, this example is one of several from this period suggesting that at least some aspects of the Article III power were still contested during the early years of the Republic.³⁶ In this regard, consider also the 1789 Judiciary Act’s provision for circuit riding, which some at the time argued was unconstitutional, and the repeal of the midnight judgeships by the Jefferson Administration as one of its first acts, the constitutionality of which remains the subject of some dispute to this day.³⁷

D. *Federal Common Law Crimes*

Federal common law crimes present a more complicated matter, but one that provides another example of certain assumptions about the federal judicial power being unsettled at the Founding. Congress gave exclusive jurisdiction to the federal courts over prosecutions for federal crimes in the 1789 Judiciary Act,³⁸ but it then only established a handful of federal crimes in the Crimes Act of 1790,³⁹ leaving “large gaps in the federal penal code.”⁴⁰

32 For a summary version of the *Correspondence*, see HART & WECHSLER, *supra* note 16, at 50–52.

33 *Id.* at 52.

34 It is conceivable that the President sent the questions based on other motives or reasons, perhaps including the fact that his cabinet (specifically Jefferson and Hamilton) disagreed on what the administration’s policy should be during the war.

35 It bears noting, moreover, that Washington and Jefferson may have believed that solicitation of such advice was appropriate in light of British practice, with which they may have been familiar, that did not observe strict lines of separation between the political and judicial roles and countenanced the regular solicitation of advice from judges over wartime policies. Indeed, the great jurist and Chief Justice of King’s Bench, Lord Mansfield, was a regular advisor to the North administration during the Revolutionary War. See James Oldham, *Murray, William, First Earl of Mansfield (1705–1793)*, in 39 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 992, 996–97 (H.C.G. Matthew & Brian Harrison eds., 2004) (noting that Mansfield, for example, regularly attended Privy Council meetings during the war); Tyler, *Habeas Corpus*, *supra* note 6 (detailing episodes involving Mansfield during the war).

36 See Fallon, *supra* note 3, at 1768.

37 See *id.* at 1773 (discussing circuit riding); *id.* at 1768 (discussing these examples).

38 Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–79.

39 Crimes Act of 1790, ch. 9, 1 Stat. 112.

40 Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1404 (2001).

Where the statutory law ended, federal judges initially stepped in to declare and enforce federal common law crimes. This practice continued well through the first decade in the life of the federal courts,⁴¹ with many lower courts concluding, in the words of one such court, that “[t]he federal courts have common-law jurisdiction of criminal cases, and may punish a crime though there be no express statute for that purpose.”⁴² By 1800, moreover, all but one of the Justices on the Supreme Court had approved of federal common law crimes while riding circuit.⁴³ The remaining Justice, Samuel Chase, launched the movement to reject federal common law crimes in 1798 in *United States v. Worrall*.⁴⁴ In his view, the courts had transgressed their carefully prescribed powers in declaring and enforcing such crimes.⁴⁵

But it was not until *United States v. Hudson & Goodwin*⁴⁶ in 1812 and *United States v. Coolidge*⁴⁷ in 1816 that the Supreme Court finally embraced Justice Chase’s position. In *Hudson & Goodwin*, which involved common law charges of seditious libel, the Court declared that before a federal court can enforce a federal crime, “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”⁴⁸ In *Coolidge*, the Supreme Court reaffirmed this position and largely settled the matter, but only after reversing an opinion by Justice Story riding circuit that upheld enforcement of a common law crime in the process.⁴⁹ To be sure, *Hudson & Goodwin* may be under-

41 See Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 53 (2009).

42 *United States v. Smith*, 27 F. Cas. 1147, 1147 (C.C.D. Mass. 1792) (No. 16,323); see *United States v. McGill*, 26 F. Cas. 1088, 1090 (C.C.D. Pa. 1806) (No. 15,676) (concluding that federal courts have jurisdiction over common law crimes); *United States v. Anonymous*, 1 F. Cas. 1032, 1034 (C.C.D. Pa. 1804) (No. 475) (instructing jury that indictments may be sustained by common law or statute); *Williams’ Case*, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708) (upholding conviction of expatriate under common law rule); *United States v. Ravara*, 27 F. Cas. 714, 714 (C.C.D. Pa. 1794) (No. 16,122a) (upholding common law indictment against a foreign consul despite the defendant’s argument that “the matter charged in the indictment was not a crime by the common law, nor is it made such by any positive law of the United States”); *Henfield’s Case*, 11 F. Cas. 1099, 1100 (C.C.D. Pa. 1793) (No. 6360) (instructing the jury on the common law crime of breach of neutrality).

43 See 1 LIFE AND LETTERS OF JOSEPH STORY 299 (William W. Story ed., 1851) (discussing federal common law crimes and noting that “excepting Judge Chase, every Judge that ever sat on the Supreme Court Bench, from the adoption of the Constitution until 1804 . . . held a like opinion”).

44 2 U.S. (2 Dall.) 384, 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766).

45 See *id.* at 393–94 (“For, the Constitution of the Union, is the source of all the jurisdiction of the national government; so that the departments of the government can never assume any power, that is not expressly granted by that instrument, nor exercise a power in any other manner than is there prescribed.”).

46 11 U.S. (7 Cranch) 32 (1812).

47 14 U.S. (1 Wheat.) 415 (1816).

48 *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 34.

49 Justice Story had considered the issue of federal common law crimes “as one open to be discussed, notwithstanding the decision in *U.S. v. Hudson*.” *United States v. Co-*

stood in part as a product of the political atmosphere,⁵⁰ but it marked an important departure from an earlier well-accepted practice.

Today the *Hudson & Goodwin* position rejecting the idea of federal common law crimes essentially controls, but some subsequent authority does question its reasoning at its broadest.⁵¹ The example reveals two lessons. First, the separation of powers concerns animating the *Hudson & Goodwin* Court were apparently lost on almost every member of the original Supreme Court and only came to be recognized several decades after the Founding. Second, notwithstanding *Erie v. Tompkins*,⁵² the fact that some enclaves of “new federal common law” (Judge Friendly’s term⁵³) have been recognized as appropriate might support lines of reasoning, like those the Supreme Court relied on in the case of *In re Debs*, questioning the wholesale rejection of federal common law crimes.⁵⁴ In other words, the separation of powers principle rejecting federal common law crimes took decades to establish and may even be, to some extent, contestable today.

* * *

Each of these examples suggests that not all of the principles of federal courts jurisprudence that we take for granted today were necessarily settled at the Founding. Take the *Correspondence* and *Hayburn’s Case*.⁵⁵ Both represent matters on which there was serious disagreement among the branches over the judicial role, and yet the early members of the Supreme Court came rather quickly to conclude that what others had unthinkingly taken for granted harbored serious constitutional problems. These examples also suggest that even where there was widespread agreement among members of the Founding generation on a proposition (such as the propriety of common law crimes or the structure built into the original Calling Forth Act), today we might view their conclusions as constitutionally suspect. (This is certainly

lidge, 25 F. Cas. 619, 621 (C.C.D. Mass. 1813) (No. 14,857), *rev’d*, 14 U.S. (1 Wheat.) 415 (1816).

50 See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 234–42 (2005).

51 See *In re Debs*, 158 U.S. 564 (1895). In the *Debs* case, the Supreme Court recognized judicial authority to provide injunctive relief where general federal power exists in the background, notwithstanding the absence of an express legislative grant of authority:

Is the army the only instrument by which rights of the public can be enforced, and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated, either at the instance of the authorities, or by any individual suffering private damage therefrom. The existence of this right of forcible abatement is not inconsistent with, nor does it destroy, the right of appeal, in an orderly way, to the courts for a judicial determination, and an exercise of their powers, by writ of injunction and otherwise, to accomplish the same result.

Id. at 582.

52 304 U.S. 64, 78 (1938) (declaring that “[t]here is no federal general common law”).

53 See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

54 See *supra* note 51.

55 See *supra* notes 18–24, 32–37 and accompanying text.

true with respect to federal common law crimes, at least as a precedential matter.) Together, these examples call into question the idea that early legislation and practices relating to the judicial power should be given determinative weight as an indicator of original meaning, rather than viewed as part of a larger unfolding story by which that power came to be defined in our constitutional framework. This inescapable conclusion counsels in favor of widening the lens of analysis to take account of arguments predicated upon text, structure, and purpose,⁵⁶ as well as unfolding historical practice⁵⁷ and precedent,⁵⁸ and perhaps normative considerations as well.⁵⁹ There is bound to be disagreement over the proper approach, but it is a conversation that federal courts scholars should be having.⁶⁰

CONCLUSION

Historical inquiry can—and must—be a part of any debate over the meaning of Article III and the myriad related questions that arise in the field of federal courts. The hard question is what to do with that history, particularly when it fails to paint an entirely consistent picture, paints a picture we do not like, or fails to paint any picture at all. My aim here has been to suggest that some of the debates at the heart of the federal courts canon tend to forget an important truth about the period surrounding the adoption of the Constitution on this score. As historian Jack Rakove has observed, the Founding period documents are the product of collective decisionmaking “whose outcomes necessarily reflected a bewildering array of intentions and

56 See, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004) (promoting the prioritization of text in the Eleventh Amendment context); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 781–96 (2010) (collecting sources on constitutional textualism and discussing “purposivist originalism”).

57 See *supra* text accompanying notes 8–9 (discussing Madison’s theory of liquidation).

58 For scholarship assigning significance to precedent, see, e.g., Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 772 (1988) (“[W]hen adherence to stare decisis promotes the underlying values of stability and continuity better than does adherence to the original understanding, the latter cannot prevail.”); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929 (2008) (promoting adherence to precedent even in some cases where the judge may disagree with the correctness of precedent). Even the most prominent originalist, Justice Scalia, does not discount the constraining function of precedent. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). For a skeptical view of precedent, see Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

59 See generally Fallon, *supra* note 3 (promoting a role for normative considerations in the interpretive process and collecting sources); see also Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 608–09 (contending that judges “should be faithful to text and principle and use the various modalities of argument—text, structure, history, precedent, prudence, and national ethos—to decide the cases before them”).

60 The papers in this series are, in this regard, a very welcome contribution.

expectations, hopes and fears, genuine compromises and agreements to disagree.”⁶¹ In other words, at least to some extent, we must treat the period as a work in progress.

61 JACK N. RAKOVE, *ORIGINAL MEANINGS* 6 (1996).

